FILE COPY

Supreme Court of the United States
FILED
AUG 15 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 267

ROBERT ALLEN, Claimant, *Appellant*,

v.

THE GLENN L. MARTIN COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Insurer, *Appellees*.

No. 268

FRANK G. HYMAN, Claimant, *Appellant*,

v.

ROBB TYLER, Employer, and EAGLE INDEMNITY COMPANY, Insurer, *Appellees*.

No. 269

JAMES BENONI, Claimant, *Appellant*,

v.

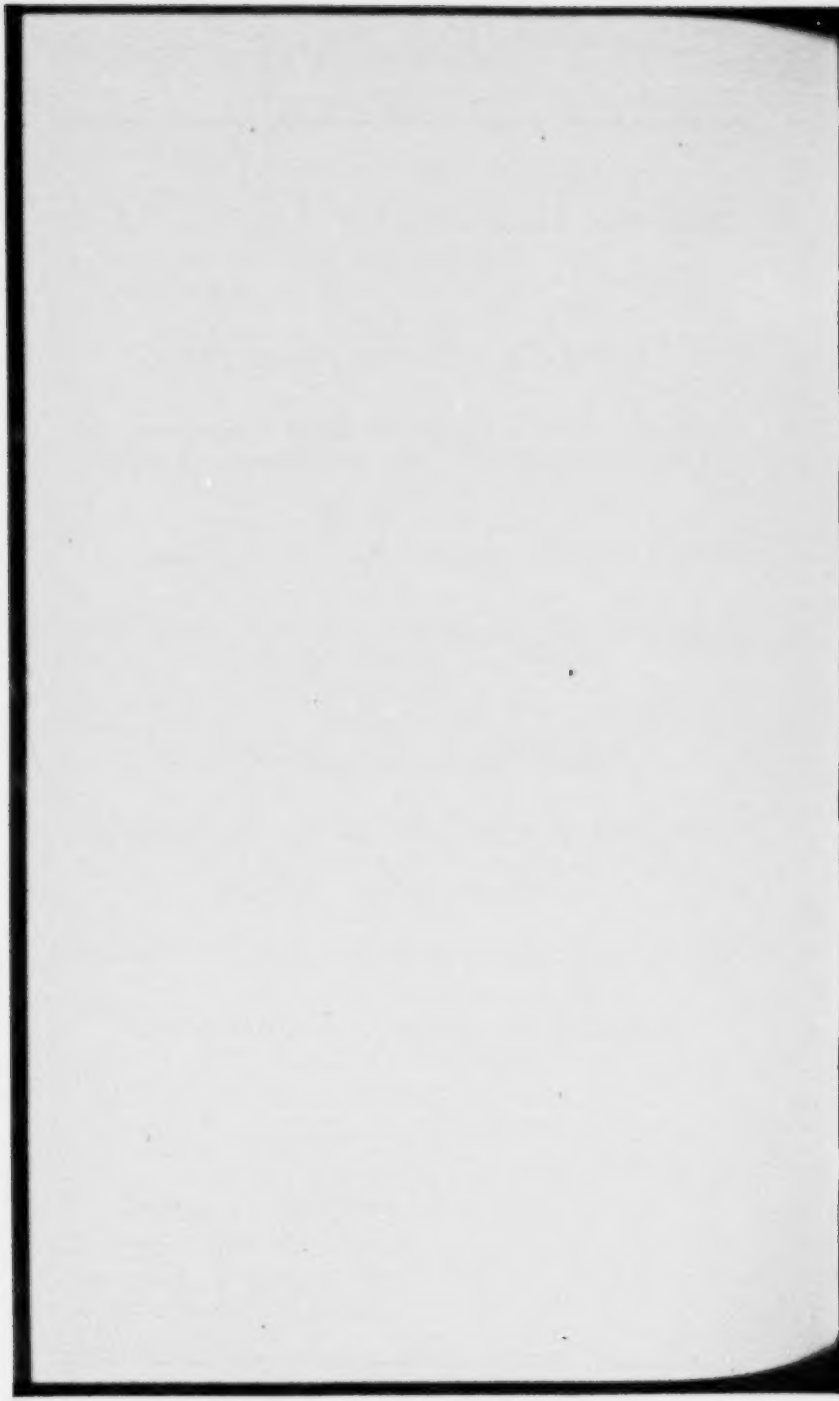
BETHLEHEM FAIRFIELD SHIPYARD, INCORPORATED, Employer, and MARYLAND CASUALTY COMPANY, Insurer, *Appellees*.

ON APPEALS FROM THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS APPEALS.

PAUL BERMAN,
SIGMUND LEVIN,
THEODORE B. BERMAN,
Counsel for Appellants,
110 East Lexington Street,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 1, Md.



BLEED THROUGH- POOR COPY

CITATIONS

TABLE OF CASES

	PAGE
Abie State Bank v. Weaver, 282 U. S. 765	10
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389	9
Arizona Copper Co. v. Hammer, 250 U. S. 400	27, 29
Baltimore Tube Co. v. Dove, 164 Md. 87, 100	18n
Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U. S. 408	31
Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441	10
Boyd v. Thayer, 143 U. S. 135	9
Bridge Proprietors v. Hoboken Co., 1 Wall. 116	7
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673	11
Broad River Power Co. v. South Carolina, 281 U. S. 537, (affmd. on rehearing, 282 U. S. 187)	10
Burns Mortgage Co. v. Fried, 292 U. S. 487	13n
Carmichael v. Southern Coal & Coke Co., 301 U. S. 495	14n
Carter v. Texas, 177 U. S. 442	10
Concordia Ins. Co. of Milwaukee v. School Dist. No. 98, 282 U. S. 545	13n
Corn Products Refining Co. v. Eddy, 249 U. S. 427	7
Covington and Lexington Turnpike Co. v. Sandford, 164 U. S. 578	9
Cudahy Co. v. Parramore, 263 U. S. 418	8, 29
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	7

	PAGE
Davis v. Wechsler, 263 U. S. 22	10
Enterprise Irrigation District v. Canal Co., 243 U. S. 157	10
Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265	8
First National Bank v. Anderson, 269 U. S. 341	9
Fiske v. Kansas, 274 U. S. 380	8
Flournoy v. Wiener, 321 U. S. 253	10
Fox River Paper Co. v. Railroad Commission of Wisconsin, 274 U. S. 651	10
General Oil Co. v. Crain, 209 U. S. 211	7
Glenn v. Field Packing Co., 290 U. S. 177	14n
Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358	13n
Greenough v. Tax Assessors of City of Newport, 67 S. Ct. 1400	10
Gregg Dyeing Co. v. Query, 286 U. S. 472	13n
Hawkins v. Bleakly, 243 U. S. 210	26
Hawks v. Hamill, 288 U. S. 52	13n
Hicklin v. Coney, 290 U. S. 169	14n
Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608	14n
Industrial Commission of Wisconsin v. McCartin, 67 S. Ct. 886	31
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571	10
Lauf v. E. G. Shinner & Co., 303 U. S. 323, page 338	14n
Lumber Mutual Casualty Insurance Co. v. Locke, 60 F. 2d 35	22
McCullough v. Virginia, 172 U. S. 102	7

BLEED THROUGH– POOR COPY

PAGE

Madera Sugar Pine Co. v. Industrial Acci. Comm. of California, 262 U. S. 499 ..... 10, 29

Mattson v. Department of Labor and Industries, 293 U. S. 151 10

Middleton v. Texas Power & Light Co., 249 U. S. 152 .. 10

Midland Realty Co. v. Kansas City Light & Power Co., 300 U. S. 109 ..... 14n

Miller v. McGraw Co., 184 Md. 529 5

Mitchell v. Clark, 110 U. S. 633 9

Moorehead v. People of New York, ex rel Tipaldo, 298 U. S. 587 ..... 13n

Mountain Timber Co. v. Washington, 243 U. S. 219 27

Murdock v. Memphis, 20 Wall. 590 10

New York Central Railroad Co. v. Bianc, 250 U. S. 596 ..... 21, 28

New York Central Railroad v. White, 243 U. S. 188 ..... 3, 21, 23, 24, 25, 27, 28

North Laramie Land Co. v. Hoffman, 268 U. S. 276 11

Northern Pacific R. v. North Dakota, 236 U. S. 585 9

Norton v. Travelers Insurance Co., 105 F. 2d 122 22

Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 30, 31

Pollock v. Williams, 322 U. S. 4 10

Quong Ham Wah v. Industrial Accident Commission, 255 U. S. 445 ..... 10, 11, 12

Sheehan Co., R. E. v. Shuler, 265 U. S. 371 10

Ross v. Oregon, 227 U. S. 150 ..... 14n

St. Louis, etc. R. Co. v. Wynne, 224 U. S. 354 8

Schechter Poultry Corp. v. United States, 295 U. S. 495 ..... 30, 31

PAGE

Solvuca v. Ryan & Reilly Co., 131 Md. 265 24

Standard Oil Co. of California v. Johnson, 316 U. S. 481 10

Starks Realty Co. v. French, 267 Ky. 255, 101 S. W. 2d 946 ..... 22n

Staten Island Rapid T. Ry. Co. v. Phoenix Indemnity Co., 281 U. S. 98 10

Thornton v. Duffy, 254 U. S. 361 10

Townsend v. Bethlehem-Fairfield Shipyard, Inc., A. 2d 365 ..... 3, 4, 5, 18n, 19n, 20, 22

United Fuel Gas Co. v. Hallanan, 257 U. S. 277 8

United States Coal & Coke Co. v. Jones, 261 Ky. 235, 87 S. W. 2d 366 ..... 22n

Wallins Creek Collieries v. Jones, 214 Ky. 775, 283 S. W. 1067 ..... 22n

Ward v. Love County, 253 U. S. 17 10

Ward & Gow v. Krinsky, 259 U. S. 503 8

Western Union Telegraph Co. v. Kansas, 216 U. S. 1 7

Wilson v. Cook, 327 U. S. 474 10

Statutes

Judicial Code, Section 237(a) [28 U. S. C., sec. 344(a)] 6, 7, 8

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., secs. 908(21) and 914(m) 22

Annotated Code of Maryland (Flack's 1939 Ed.):

Article 101, sec. 48(1) 18

Article 101, sec. 48(3) 17, 21n

Kentucky Rev. Stats., Baldwin's 1943 Rev., Ch. 342, Workmen's Comp., sec. 342.110 ..... 22n

BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

ROBERT ALLEN, Claimant, *Appellant*,

v.

THE GLENN L. MARTIN COMPANY, Employer, and GLOBE INDEMNITY COMPANY, Insurer, *Appellees*.

No. .....

FRANK G. HYMAN, Claimant, *Appellant*,

v.

ROBB TYLER, Employer, and EAGLE INDEMNITY COMPANY, Insurer, *Appellees*.

No. .....

JAMES BENONI, Claimant, *Appellant*,

v.

BETHLEHEM FAIRFIELD SHIPYARD, INCORPORATED, Employer, and MARYLAND CASUALTY COMPANY, Insurer, *Appellees*.

ON APPEALS FROM THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS APPEALS.

STATEMENT.

In view of the fact that the federal questions presented in each of these three cases are the same, and the motions of appellees in all the cases to dismiss the appeals and their supporting briefs are identical in their grounds for dis-

missal and argument, appellants respectfully submit this single brief in opposition to the motions to dismiss the appeals as applicable to all three cases.

ARGUMENT.

I.

The Lower Court's Judgments on its Decisions construing and applying as construed the "Other Cases" Provision of the Maryland Workmen's Compensation Act are based solely upon the rejection of rights seasonably asserted by Appellants under the Federal Constitution.

Appellees' first ground for the dismissal of these appeals, namely, that the judgments sought to be reviewed are "not based upon a Federal ground adequate to support a review" by this Court, necessarily ignores that the decisions below construed the "other cases" provision of the Maryland workmen's compensation act and applied and enforced it as thus construed in the proceedings involving appellants' claims for compensation for their permanent disabilities, against distinct and timely insistence by each of appellants that the statutory provision as thus construed was void under Section 1 of the 14th Amendment to the federal Constitution. Moreover, there was no nonfederal ground invoked by the court below, or even discussed by it, in denying the challenge to the constitutional validity of the statute as thus construed, and in affirming the awards made under the statute as thus construed for the conceded permanent disabilities of appellants resulting from injuries admittedly arising out of and in the course of their respective employments.

As hereinafter more fully shown under Point II discussing the substantiality of the federal questions involved in these appeals, it is respectfully submitted to be beyond

BLEED THROUGH– POOR COPY

question that state workmen's compensation statutes, abridging, as they do, fundamental rights and remedies of the employee as well as his employer, must not in their operation or as applied and enforced against employees and their claims for compensation be arbitrary, unreasonable or capricious. When they are, they cannot escape condemnation as violative of the rights guaranteed against impairment by the 14th Amendment. This Court has held that state workmen's compensation legislation "cannot be supported except on the ground that it is a reasonable exercise of the police power of that state". *New York Central Railroad Co. v. White*, 243 U. S. 188, 206. So that no argument is required to demonstrate that if the "other cases" provision of the Maryland act, as construed by the court below and as applied and enforced in these cases, is arbitrary, unreasonable or capricious, or on its face reveals an inconsistency with the requirements of due process of law or an unwarranted delegation of power such as the Maryland legislature itself, in the first instance, could not constitutionally have made, it necessarily follows that fundamental rights of appellants have been abridged and they have been deprived of these rights and their property without due process of law.

The Statement as to Jurisdiction in each of these cases shows that while they were pending on appeal from the Industrial Accident Commission of Maryland to *nisi prius* courts in Baltimore City, the "other cases" provision of the act, which had theretofore received construction at the hands of the court below, and under which provision each of these cases concededly is compensable, was further construed in *Townsend v. Bethlehem-Fairfield Shipyard, Inc.*, 47 A. 2d 365, decided May 14, 1946. The further construction of the provision by that decision included, among other amendatory interpretations, language terminating, for all

practical purposes, the theretofore existing statutory right of appeal from decisions of the Commission making awards under the "other cases" provision. Whereupon appellees filed in the *nisi prius* courts where the respective appeals from the Commission were pending motions to dismiss them under the authority of the provision as thus further construed in the *Townsend Case*.

Thereupon, as further shown in the Statements, each appellant seasonably challenged as constitutionally invalid under the 14th Amendment the "other cases" provision of the act as construed in the *Townsend Case* and as appellees by the grounds asserted in their motions to dismiss the appeals to the *nisi prius* courts were attempting to have it applied and enforced in these cases.

The grounds of challenge were that under the "other cases" provision, not as enacted but as construed by the court below, the Industrial Accident Commission of Maryland was given unlimited authority and discretion to allow compensation without any prescribed guide, rule, basis or standard reasonably adapted to produce a fair result, and an unbridled and definitive discretion to accord to claimants discriminatory treatment, and therefore the "other cases" provision as thus construed was void on its face as being inconsistent with the requirements of due process and as constituting an unwarranted delegation of power such as the legislature itself, in the first instance, could not constitutionally have made, and its enforcement, operating to limit the amounts of the awards of compensation to appellants to $750, $650 and $750, respectively, for their conceded permanent partial disabilities, abridged the fundamental rights of appellants and deprived them of their property without due process of law and denied them the equal protection of the laws, and, particularly, deprived them of their rights to adequate and reasonable com-

BLEED THROUGH– POOR COPY

pensation or damages to be arrived at under reasonable and valid legislation or by the proper and lawful processes of the common law. Denying that challenge, the *nisi prius* courts and the court of least resort of Maryland sustained the validity of the "other cases" provision as it had been further construed in the *Townsend Case* and adopted and applied a similar construction in the instant cases.

Appellants do not, as appellees urge, seek to have this Court place any construction on the meaning and effect of the "other cases" provision of the Maryland statute. Appellants' sole contention here is that the "other cases" provision, on its face and as construed and applied to appellants' claims for compensation for their injuries and ensuing disabilities by the lower court, contravenes the due process and equal protection clauses of the 14th Amendment for the reasons already given herein and as shown in the Statement as to Jurisdiction.

It is true that in the Statement appellants point out, merely, however, in the interest of accuracy and so that this Court might be apprised of the complete background of this litigation, that the "other cases" provision as enacted expressly provided that in cases compensable under it each claimant was to receive for his permanent partial disability compensation at a prescribed rate "payable during the continuance of such partial disability, but not to exceed three thousand dollars." This unequivocally expressed the clear and unambiguous intent that the legislature of Maryland considered that in cases of permanent partial disability compensable under the "other cases" provision, as the case of each appellant was, a reasonable and adequate amount of compensation was $3,000. Indeed, this legislative pronouncement plainly reflecting its obvious intention was recognized by the court below in *Miller v. McGraw Co.*, 184 Md. 529, where it is said (at page 540):

"Although the statute prescribes that these payments shall be made 'during the continuance of such partial disability' and the subsection we are now discussing pertains to the type of disability that is 'permanent,' thus indicating, if literally construed, that every claimant under the 'Other Cases' paragraph would ultimately get the limit of $3,000 compensation, this Court has not adopted such a construction."

But appellants do not seek by these appeals to have this Court "review and revise the construction affixed to a State statute, as to a State matter, by the Court of last resort of the State" as appellees insist in the course of their argument that the judgments below are "not based upon a Federal ground adequate to support a review." Nor do appellants question the wisdom of the court below. The position of appellants, as shown in their respective Statements as to Jurisdiction, is that the "other cases" provision of the statute as construed and applied by the court below is invalid in that it unconstitutionally impairs if not destroys their rights and causes of action protected under the federal Constitution. Appellants, in the respective courts of first instance, seasonably insisted that as to their claims for compensation the "other cases" provision of the statute as construed by the court below violated their rights under the 14th Amendment. Nevertheless the decisions from which these appeals are taken applied and enforced the "other cases" provision as thus construed, expressly rejecting appellants' claims under the federal Constitution, thus affirming the validity of the "other cases" provision as construed.

In these circumstances the judgments sought to be reviewed were based upon a federal ground and this Court has jurisdiction, under Section 237(a) of the Judicial Code,

BLEED THROUGH- POOR COPY

to review the decisions on these appeals and to inquire into the unconstitutionality of the "other cases" provision as so construed and applied.

It is respectfully submitted that the decisions of this Court in situations indistinguishable in essentials from those at bar conclusively support the jurisdiction these appellants invoke.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, decided under the legislation in force when the act of January 31, 1928, was passed, and which involved the constitutional validity of a state statute as construed to apply to the activities of a party who contended that, as applied, it contravened the commerce clause of the federal Constitution, the jurisdiction of this Court to review the case on writ of error was challenged. In discussing its jurisdiction on writ of error, this Court, speaking through Mr. Justice Van Devanter, said (pp. 288-290):

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144; *McCullough v. Virginia*, 172 U. S. 102, 116, 117; *General Oil Co. v. Crain*, 209 U. S. 211; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427. And see *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 3, 27. The case is therefore of the class described in the first of the provisions [Sec. 237(a)] which we have quoted from the jurisdictional section. * * * Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where

the validity of a state statute is drawn in question because of the alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error; * * *

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, and *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277."

In *Fiske v. Kansas*, 274 U. S. 380, plaintiff in error was convicted under a statute whose validity, as applied to convict him, he challenged as violative of the due process clause of the 14th Amendment to the federal Constitution. In sustaining that contention, this Court, speaking through Mr. Justice Sanford, said (pp. 385-386):

"A decision of a State court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under section 237 of the Judicial Code (Comp. St. Sec. 1214). * * * The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow v. Krinsky*, 259 U. S. 503, 510; *Cudahy Co. v. Parramore*, 263 U. S. 418, 422. And see *St. Louis, etc. R. Co. v. Wynne*, 224 U. S. 354, 359.

"And this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of

BLEED THROUGH– POOR COPY

law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pacific R. v. North Dakota*, 236 U. S. 585, 593; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394, and cases cited."

In *First National Bank v. Anderson*, 269 U. S. 341, involving a suit by a national bank on behalf of its shareholders to restrain the collection of an alleged discriminatory tax levied against the latter on their shares, the tax was assailed on the ground that the state law under which the tax was levied, if construed and applied according to its words, did not permit any discrimination against national bank shares, or, in the alternative, if construed and applied to sustain the tax, the state statute was in violation of a federal statute prohibiting such discrimination. The state court held that the state statute permitted the discrimination and denied the bank's contention that, when so construed and applied, the state law conflicted with the federal statute. On petition for writ of error the jurisdiction of this Court was challenged on the ground that the state court's decision in construction of the state statute and the sufficiency of the bank's petition was conclusive and binding on this Court. In denying that contention, this Court, speaking through Mr. Justice Van Devanter, said (p. 346):

"Plainly the first ground cannot be maintained. Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law, and, where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. *Mitchell v. Clark*, 110 U. S. 633; *Boyd v. Thayer*, 143 U. S. 135; *Covington and Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 595;

Carter v. Texas, 177 U. S. 442. The principal is general, and is a necessary element of this court's power to review judgments of state courts in cases involving the application and enforcement of federal laws. *Davis v. Wechsler*, 263 U. S. 22, 24.

"• • • In cases coming from state courts this court's power and concern are specially directed to rulings made or refused on federal questions. *Murdock v. Memphis*, 20 Wall. 590, 638; *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441, 444."

See also:

Broad River Power Co. v. South Carolina, 281 U. S. 537, 540 (affmd. on rehearing: 282 U. S. 187); *Thornton v. Duffy*, 254 U. S. 361, 366; *Pollock v. Williams*, 322 U. S. 4, 13; *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 164; *Ward v. Love County*, 253 U. S. 17, 22; *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U. S. 651, 655; *Abie State Bank v. Weaver*, 282 U. S. 765; *Flournoy v. Wiener*, 321 U. S. 253; *Wilson v. Cook*, 327 U. S. 474; *Greenough v. Tax Assessors of City of Newport*, 67 S. Ct. 1400, 1406; *R. E. Sheehan Co. v. Shuler*, 265 U. S. 371; *Staten Island Rapid T. Ry. Co. v. Phoenix Indemnity Co.*, 281 U. S. 98; *Madera Sugar Pine Co. v. Industrial Acci. Comm. of California*, 262 U. S. 499; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152; *Mattson v. Department of Labor and Industries*, 293 U. S. 151; *Standard Oil Co. of California v. Johnson*, 316 U. S. 481.

The rule so clearly enunciated and applied in these cases is in nowise qualified by the authorities cited and relied upon by appellees. Their chiefly relied upon case, *Quong Ham Wah v. Industrial Accident Commission*, 255 U. S. 445, where, conversely to the situation here, a state statute concededly unconstitutional on its face as enacted was con-

BLEED THROUGH– POOR COPY

strued to apply in a constitutional manner, holds only that "this Court is without authority to review and revise the construction affixed to a state statute *as to a state matter* by the court of last resort of the state." That is, of course, a recognized qualification of the jurisdiction of this Court, but subject to it that case actually is authority for the jurisdiction of this Court where there is seasonably interposed a question arising under the federal Constitution, and the case has been uniformly cited to that effect. It was so cited by this Court in *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, involving the constitutional validity of the Public Road Law of Wyoming, and where, after discussing the construction of the statute by the state court as affecting procedural matters, this Court, speaking through Mr. Justice Stone, said (p. 282):

> "By this interpretation of the meaning and effect of the statute of Wyoming we are likewise bound, but we are nevertheless free to inquire whether the statute as interpreted and applied by the state court denies rights guaranteed by the Constitution and to consider the contention of plaintiff in error that the statute itself is unconstitutional because of the insufficiency of the required notice of the proceedings had under it, and because by it plaintiff was denied a hearing within the meaning of the due process clause of the Fourteenth Amendment."

Likewise citing *Quong Ham Wah v. Industrial Accident Commission, supra*, and reviewing the authorities generally, is *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, in which a taxpayer, seeking injunctive relief in equity from alleged discriminatory assessments, was held by the state court, in reversing its previous construction of a state statute, to have failed to avail itself of an administrative remedy by appeal to the state tax commission which had authority to grant a hearing and afford relief under the statute as newly construed. In this Court the taxpayer

contended that the statute as thus construed violated his rights under the federal Constitution, and, in holding the decision of the state court to be reviewable by this Court, Mr. Justice Brandeis, speaking for the Court, said (pp. 680-682):

"* * * If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. * * * The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. *

"It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions (citing *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U. S. 445); and that the mere fact that a state court has rendered an erroneous decision on a question of state law * * * does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.

"* * * We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute. * * * Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede* Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."

BLEED THROUGH– POOR COPY

Nor do the remaining authorities cited by appellees support their position that this Court's judicial power is insufficient to authorize review and revision of the decision of the lower court sustaining the validity of the "other cases" provision, as construed by that court, against appellants' showing of the infringement thereby of their substantial rights under the federal Constitution. The rule reflected in the cases cited by appellees is merely that the meaning and effect attributable to a state statute, as well as the upholding or rejection of its validity under a state constitution, are binding on this Court. Not binding, however, is a state court's holding of such statute to be constitutionally valid as against a timely claim of its invalidity under the federal Constitution. Reference to each of the cases cited by appellees reveals no departure from that rule.*

---

* *Concordia Ins. Co. of Milwaukee v. School Dist. No. 98*, 282 U. S. 545, involved no claim of federally created or protected right but merely questions whether the lower federal courts had departed from the rule of decision where federal jurisdiction was conferred solely by diversity of citizenship. To the same effect is *Hawks v. Hamill*, 288 U. S. 52, where Mr. Justice Cardozo, for this Court, at page 59, emphasized that there was no controversy as to "violation of the restraints of the Federal Constitution. We are not to confuse the standards of independent judgment appropriate to such conditions with those appropriate where the only basis of jurisdiction is diversity of citizenship. * * * What is at issue in this case is not an actual or even a claimed impairment of any right or privilege assured to the respondents by the Constitution of the Nation." Likewise to the same effect is the holding in *Burns Mortgage Co. v. Fried*, 292 U. S. 487.

In *Moorehead v. People of New York, ex rel Tipaldo*, 298 U. S. 587, involving the validity of the New York minimum wage law, the Court of Appeals of New York had sustained the claim of unconstitutionality of the statute under the due process clauses of both the state and federal Constitutions. *Gregg Dyeing Co. v. Query*, 286 U. S. 472, refutes appellees' own argument and confirms the appellate jurisdiction and power of this Court which, speaking through Mr. Chief Justice Hughes, there said (p. 480):

> "What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution."

To the identical effect is *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, where this Court, speaking through Mr. Justice Cardozo, said (pp. 362, 365):

> "Enough for us that the construction, whether we view it as wise or unwise, does not expose the court that made it to the reproach of with-

II.

These Cases involve Important and Substantial Questions of Federal Law.

Although appellees conclude in general terms and urge upon this Court that no substantial federal question is in-

---

holding from the carrier the privileges and immunities established by the Constitution of the Nation.

"The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts."

In *Glenn v. Field Packing Co.*, 290 U. S. 177, this Court sustained the finding by a district court of a state statute's invalidity "under the state constitution. The question presented under the Federal Constitution was not decided. * * * so far as the application of the state Constitution is concerned, the ultimate determination of the validity of the statute necessarily rests with that (Kentucky) court." In *Hicklin v. Coney*, 290 U. S. 169, involving the constitutionality of state statutes regulating transportation by motor vehicles, the state court's construction of the statutes, which this court held to be controlling of it, exempted appellant there from the burden which it complained rendered the statute unconstitutional as applied to it. *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608, where the Virginia Milk and Cream Act of 1934 was assailed as violative of both the Virginia and federal Constitutions, declares no such restriction, as appellees claim, on this Court's jurisdiction to review a state court's construction of a state statute but expresses only the well established rule (at page 613) that: "A judgment by the highest court of a state as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

The holding in *Midland Realty Co. v. Kansas City Light & Power Co.*, 300 U. S. 109, where it was contended that the public service commission law of Missouri, as construed by the state court, unconstitutionally impaired the obligation of a contract and violated the due process clause of the Fourteenth Amendment, was only that (at page 113): "These (constitutional) questions are to be decided upon the construction that the state supreme court put upon the statute." In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, where the constitutionality of a state unemployment compensation act had been challenged in the district court on the ground of the repugnancy of the act to the state constitution, this Court said that a decision by the highest state court, subsequent to the district court decision and pending appeal to this Court, holding the act valid under the state constitution, "put at rest" (page 507) the claim of repugnancy to the state constitution.

Appellees' citation of *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, at page 338, is to the *dissenting opinion* of Mr. Justice Butler who merely reiterates the rule that the meaning of a term employed in a state statute, as defined by the highest court of that state, is the meaning which this Court is bound to attribute to the term. And in *Ross v. Oregon*, 227 U. S. 150, the refusal of this Court to review a decision of a state court allegedly violating the prohibition in the federal Constitution against *ex post facto* laws was predicated on the holding that the constitutional restriction in question was aimed at the legislative and not at the judicial power of states; nor would this Court review the correctness of a ruling of a state court wherein it had construed a provision of the state constitution as having a prospective rather than a retroactive operation.

BLEED THROUGH– POOR COPY

volved on these appeals they in nowise specify in their motions the alleged insubstantiality of either the questions involved or appellants' claims. Nor do appellees even attempt to deny that appellants' substantial rights have been so seriously affected as to be virtually destroyed by the application and enforcement against them and their claims for compensation of the statute as construed by the court below.

While it is distinctly not a purpose of this brief to present these cases upon their merits but merely to oppose the motions to dismiss the appeals herein, it is nevertheless obvious that the ground of alleged want of substantiality of the questions presented, asserted in the motions as a reason for dismissal, necessarily concerns the merits, at least to the extent involved in showing that this Court has recognized in its previous decisions that the federal grounds upon which appellants challenged the validity of the statute as construed are substantial. For that purpose a brief discussion of the meaning and effect of the "other cases" provision as the court below construed it, its constitutional defects, and the previous decisions of this Court establishing the norm of constitutionality of state workmen's compensation laws, seems necessary.

Unlike a situation where a legislative body by unequivocal pronouncement repeals and re-enacts with amendments a statutory provision which then, as amended, stands plainly in lieu of its predecessor provision, it is necessary here, in order to ascertain the meaning and effect now to be attributed to the "other cases" provision, that the provision both as enacted and as amended by interpretation by the court below be considered and that the provision as enacted be altered in every respect and to every extent in and to which, from all of the language of the court below, such alteration is indicated. No difficulty in this process

would be encountered in a case where the meaning of a word or, indeed, of an entire phrase of a statute were the subject of judicial interpretation, but where, as here, the construction is so radical in extent and so far-reaching in effect as to constitute a new departure and to result in an entirely different statute with an entirely new and different scope, the difficulty in arriving with any degree of certainty at the meaning and effect of the statute as construed is greatly magnified. Especially is this true where, as was not done here, the construing court makes no effort compactly to restate the results of its amendatory interpretation. If there is to emerge an expression to which may be attributed the dignity of a pronouncement of organic law, the opinions below must be combed for words which must then be examined for evidence of the judicial intention necessary to be ascertained in the determination of what the "other cases" provision now means. This result, in itself, robs the statute as construed of the element of certainty which, as shown by the decisions hereinafter cited, must necessarily characterize state workmen's compensation acts if they are to meet the test of constitutionality.

The principal result of the amendments of the provision by judicial construction is that the $3,000, which in the provision as enacted, was *the* amount of compensation payable in a case properly compensable under "other cases," is now made the maximum amount of compensation payable under the provision; as enacted, it provided that a claimant whose disability met the requirements of and was compensable under it was entitled to compensation at a rate computed in accordance with the scale prescribed by the provision, payable during the continuance of his partial disability, but not to exceed $3,000. The Commission is now authorized to award an "aggregate amount of compensation" less than $3,000, in the determination of which

BLEED THROUGH– POOR COPY

it is to have "due regard to the character of the permanent partial disability, and the impairment of wage earning capacity therefrom, as compared with the scheduled cases of permanent partial disability specifically provided for."

This phrase last quoted from the opinion below in *Allen v. Glenn L. Martin Co.*, (at page 610 of 52 A. 2d) is the only language of the court below which may be said to indicate to the Commission how or in what manner it is to exercise the broad and sweeping discretion now vested in it in arriving at the aggregate amount of compensation it determines to award. Appellants submit that as a guide, rule, basis or standard in aid of a determination of the amount of compensation to be allowed, the quoted language of the court below is meaningless, and confers upon the Commission a discretion so unfettered and uninhibited as to amount to an absolute and arbitrary one.

To direct the Commission, as the provision as now construed does, to have regard for the "character" of a permanent partial disability is to repeat a redundancy, because the word "character" as referable to disability, and as used in section 48(3) of Article 101 of the Annotated Code of Maryland (Flack's 1939 Ed.), the same subsection in which the "other cases" provision as enacted appears, is itself employed only to differentiate between and to designate whether a disability is "total" or "partial". The subsection begins: "(3) (Permanent Partial Disability.) In case of disability *partial in character* but permanent in quality, the compensation shall be * * *." Hence, to direct a regard to the "character" of the permanent partial disability means, at most, merely to look at or note the permanent partial disability. The vital, essential and controlling factor necessary to be considered in reaching a reasonable result in determining an amount of compensation to be

awarded is not only the character but particularly the "duration" of the disability, as shown by the decisions of this Court quoted *infra*.

Further, to direct regard to the impairment of wage earning capacity, without more, furnishes no guide, rule, basis or standard to aid the exercise of or to control the discretion. It cannot sensibly mean that the Commission should determine the percentage of loss of wage earning capacity and award an amount representing an equal percentage of what is now the maximum amount allowable, although that would seem an obvious construction of the language used. However, that method of reaching the amount of an award would lead to an absurd result because a claimant with a 100% loss of wage earning capacity would be permanently totally disabled and entitled to $6,000 under the statute in force at the time the "other cases" provision was enacted and $7,500 at the time of its construction by the court below [Article 101, Section 48(1)]. Moreover, that process of computation was expressly rejected as wrong by the court below in the *Townsend Case* without, however, indicating in any of its opinions what would be a correct method of computation, or in what manner or to what extent the amount of compensation awarded is to be based upon or related to impairment of wage earning capacity.*

---

* In *Townsend v. Bethlehem-Fairfield Shipyard, Inc.*, 47 A. 2d 365, at page 372, it is said:

> "It is suggested that the Commission has made a practice of awarding the maximum weekly amount in each case, and has indicated the percentage of loss of wage-earning capacity found by the percentage of the maximum given as the limit of the particular award. If this is true, it is wrong under the statute, and has the effect of preventing an appeal by the claimant. We cannot, however, assume on the face of the record that such a method was adopted in the case before us."

In *Baltimore Tube Co. v. Dove*, 164 Md. 87, at page 100, it is said:

> "* * * The award itself does not disclose how the commission reached the amount of compensation that was to be paid. Yet it cannot be said that it did not reach its conclusion as directed by the statute. The aggregate amount required by the order to be paid to the claimant is not in excess of

BLEED THROUGH— POOR COPY

Finally, the direction of the court below to the Commission to compare the permanent partial disability "with the scheduled cases of permanent partial disability specifically provided for" likewise provides no guide, rule, basis or standard to channel or control the discretion of the Commission; because what possible profitable comparison in determining an amount of compensation to be awarded may be made, for example, between a permanent partial loss of use of the back of a claimant and the loss or loss of use of a hand, arm, foot, leg or eye of a claimant? Is a 50% loss of use of the back worth more or less than the loss of the members mentioned? How is the Commission to determine this and the countless other questions that arise, in the absence of a statement of policy or some prescribed guide, rule, basis or standard reasonably adapted to produce a fair result?

That the language of the opinions below purporting to furnish a guide to the Commission is fruitless and meaningless is established by the results obtained in the cases at hand. In *Allen v. Martin* the evidence established that the claimant had an admitted disability amounting to a 25% loss of use of his back, for which the Commission allowed him $750. If he had lost 25% of the use of an arm or leg he would have been allowed $954 (25% of 212 weeks at $18 per week). Certainly the loss of 25% of the use of the back, which in a laboring man controls the use of his arms and legs, should require a greater allowance than the loss or loss of use of 25% of one arm or one leg. Yet

---

$3,000, the limit fixed by the statute. The award provides for the payment of $1,000 and no more, which is within the sum allowed by the statute."

At the trial of the case of *Allen v. Martin* herein it was established by the testimony of the member of the Commission who decided that case that the method he used in arriving at the amount awarded Allen was the identical method condemned by the court below in the *Townsend Case*. Similarly in the case of *Hyman v. Tyler*, a proffer in writing was made to prove that the member of the Commission who decided that case employed the same method as was used in the *Allen* case and condemned as wrong in the *Townsend Case*. Yet the court below, when shown what the Commission practice in fact had been, held that it could not look at those facts!

the court below approved as proper an award allowing less for a 25% loss of use of the back than would be required to be allowed for a 25% loss of use of one arm or one leg.

In the *Townsend Case* the court below gave the Commission an absolute discretion; in the instant cases the discretion conferred is no less absolute, because while the court below attempted to qualify that discretion it actually laid down a defective and wholly inadequate guide for the Commission to follow. While giving lip service to this supposed yet improper guide the court below nevertheless approved the action of the Commission in all of the instant cases awarding compensation which was established to have been arrived at by the Commission in a manner which the court below in the *Townsend Case* had, in no uncertain language, condemned as wrong, and which was also shown not to have been in accordance with the supposed guide the court below ruled the Commission ought to have followed.

Further proof of the fact that the supposed guide, which the court below held the Commission had to follow in arriving at the amount to be awarded a claimant whose disability is compensable under the "other cases" provision, is unavailing to a claimant, is shown by the decision below in *Benoni v. Bethlehem Fairfield Shipyard, Inc.* Appellant in that case attempted to have his compensation based on the amount of compensation allowable for disability to each arm and each leg, whose use he contended was affected by reason of the injury to his back. The court below held that he could not do this.

It is obvious that what the court below did in setting out the purported guide in *Allen v. Martin* was done in an effort to meet the constitutional objections to giving the Commission *carte blanche* to allow anything it pleased up

BLEED THROUGH– POOR COPY

to $3,000.00 without a guide, rule, basis or standard adapted to produce a fair result. The court below adopted the guide provided for in making an allowance in cases of disfigurement,* which guide cannot be applied so as to produce a fair result in cases where the disability should be compensated for under the "other cases" provision. It is clearly pointed out in *New York Central Railroad Co. v. Bianc*, 250 U. S. 596, and in the opinion in those cases in the Court of Appeals of New York (226 N. Y. 199, 123 N. E. 82, 856, 893) by its then Judge Cardozo, that cases of disfigurement present a special problem and it is therefore necessary to give the commission some latitude in making an award for such injury. But in cases of disability under "other cases" there is no such special problem as disfigurement cases present. In order to arrive at a fair amount under "other cases" the compensation must be based on the *loss of earning capacity* and the *character* and *duration* of the disability. *New York Central Railroad Co. v. White*, 243 U. S. 188. Any guide which permits the Commission to ignore any one of these three elements in arriving at the amount of compensation to be awarded violates the constitutional tests, as it permits the Commission to give varying amounts for the same disability. This is clearly shown by the analysis of the cases decided by the Commission and included in the record in these cases.

This analysis of the cases decided by the Commission shows that it allows compensation varying from $150 to $3,000 for disability under the "other cases" provision of the statute.

---

* As to disfigurements the Maryland act, section 35(3) (formerly section 48) of article 101, provides:

"Disfigurements—For other mutilations and disfigurements not hereinbefore provided for, compensation shall be allowed in the discretion of the Commission, for not less than ten weeks nor more than one hundred weeks, as the Commission may fix, in each case having due regard to the character of the mutilation and disfigurement as compared with mutilation and injury hereinbefore specifically provided for."

In attempting to affix to the "other cases" provision a meaning and effect which could in some manner validly permit the Commission to exercise the absolute discretion which actually resulted, the court below in the *Townsend Case* (at page 371 of 47 A. 2d) first reviewed some of the decisions in which provisions of other compensation acts identical to the "other cases" provision in the Maryland act had been construed to mean what their language plainly stated (i. e., the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., secs. 908(21) and 914(m); *cf., Lumber Mutual Casualty Insurance Co. v. Locke*, 60 F. 2d 35; *Norton v. Travelers Insurance Co.*, 105 F. 2d 122, 123), and continuing, said:

> "On the other hand, without naming them in detail, there are a number of states which, by statute, confer upon accident boards and commissions discretion to limit the amount or duration of such payments to a sum or period less than the maximum named. That is the effect of the prior decisions of this Court construing the 'Other Cases' section, which by judicial interpretation, reach the same result achieved in these other states by unequivocal statutory provisions."

The fact is, however, that there is no state in the United States whose compensation statute confers upon its accident board or commission the discretion which the court below unconstitutionally attempted to give to the Maryland Commission.* This was shown to the court below by a comprehensive survey of the compensation statutes of

* The only state whose compensation statute confers upon its board a discretion even approaching that attempted to be given by the court below is Kentucky (Rev. Stats., Baldwin's 1943 Rev., Ch. 342, Workmen's Comp., sec. 342.110); but the Court of Appeals of Kentucky, in construing the provision, held that in all cases of permanent partial disability coming within its purview the period during which compensation shall be paid must be the maximum limit specified in the statute, even though it is based on a percentage of weekly wages instead of loss of wage earning capacity. *Starks Realty Co. v. French*, 267 Ky. 255, 101 S. W. 2d 946; and *cf., United States Coal & Coke Co. v. Jones*, 261 Ky. 235, 87 S. W. 2d 366; and *Wallins Creek Collieries v. Jones*, 214 Ky. 775, 283 S. W. 1067.

BLEED THROUGH- POOR COPY

each of the 46 states other than Maryland (Mississippi has no compensation statute) having such statutes.

The defects in the provision as now construed transcend any mere lack of wisdom. They go far deeper, in that they are symptomatic of a statute too constitutionally imperfect to accord with even the barest requirements of due process of law. The extent of the resulting discretion in the Commission to vary the amounts of its awards under "other cases", the exercise of which lacks any standard or guide therefor, is unconstitutional as a deprivation of property without due process of law under the 14th Amendment.

Moreover, when regard is had to the whole compensation law of Maryland, it is obvious that the resulting difference in the methods and techniques of making awards of disability compensation, on the one hand for the "other cases" types under that provision as now construed, and on the other for the otherwise specified instances of disability, constitutes a deprivation of the equal protection of the laws and a denial of privileges and immunities under the 14th Amendment, in that related types of disability not involving sufficiently substantial differences are compensated according to entirely separate techniques and procedures, the difference between which has no reasonable relation to the difference between the respective disabilities.

As mentioned above under Point I of this brief, this Court early held that the constitutionality of state workmen's compensation legislation cannot be supported except on the ground that it is a "reasonable exercise of the police power of the state", and that as the rights of both employer and employee are so intermingled in such legislation, the statute, "if invalid as against the employee, is invalid as against the employer", *New York Central Railroad Co. v.*

White, 243 U. S. 188. As further pointed out in the opinion in that case, the New York statute there being considered (after which the Maryland statute was modeled, see: *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 270) "sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before * * *, he is entitled to moderate compensation in all cases of injury, and has a *certain* and speedy remedy without the difficulty and expense of establishing negligence or proving the *amount of the damages.*"

In addition to the certainty of remedy, totally lacking in the "other cases" provision as construed yet essential to the constitutional validity of a workmen's compensation act as applied to an employee's claim, this Court further in that case emphasized the features of the statute before it which imported into that act the vital elements of reasonableness. Speaking through Mr. Justice Pitney, the Court said:

> "* * * Compensation under the act is * * * graduated according to the average weekly wages of the injured employee and the *character and duration* of the disability, whether partial or total, temporary or permanent; * * *
>
> "* * * the statute * * * graduates the compensation for disability according to a *prescribed scale* based upon the loss of earning power, having regard to the previous wage and the *character and duration* of the disability.
>
> "* * * it is not unreasonable for the state * * * to require him (employer) to contribute a reasonable amount, and according to a *reasonable and definite* scale, by way of compensation for the loss of earning power * * *. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases * * * and

BLEED THROUGH– POOR COPY

substitute a system under which * * * he is sure of a *definite and easily ascertained compensation*, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the *prescribed scale*.

"* * * Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and *definite compensation* in money to every disabled employee * * *.

"This, of course, is not to say that *any scale of compensation*, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

In the cases at bar the questions *have* arisen, not merely because of the unreasonableness of the amounts of the respective awards or the insignificance of a prescribed scale of compensation, but for the far more substantial reasons that the "other cases" provision as construed altogether lacks any scale of compensation and illegally and unconstitutionally delegates to the Commission the unbridled and unfettered discretion to award any amount of compensation it sees fit in a case compensable under the provision, without any guide, rule, basis or standard to control or direct its discretion or reasonably adapted to produce a fair result.

In the *White Case* this Court recognized the possibility of and condemned in advance a construction of a workmen's compensation statute which would permit the exercise by a commission of any such unbridled discretion as has been indulged in and exercised in the cases at hand. In

discussing and holding valid Section 50 of the New York act providing for the employer's methods of securing compensation payments, this Court said:

> "* * * The third clause of section 50 has not been, and presumably will not be, construed so as to give an *unbridled discretion* to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on *reasonable* terms. No question is made but that the terms imposed upon this railroad company were reasonable * * *; hence no criticism of the practical effect of the third clause is suggested."

Appellants here have shown, and indeed it is submitted to be obvious, that the "other cases" provision here has been construed so as to give the *unbridled discretion*, which this Court plainly condemned as unconstitutional, to the Commission. Thus the practical effect of the "other cases" provision as construed is directly in issue on these appeals.

In subsequent cases where the question of the constitutional validity of state compensation acts came before this Court the doctrines expressed in the *White Case*, that these statutes on their face and in their application must, in order to meet the test of constitutional validity and accord with permissible state action, be reasonable, certain and definite and not arbitrary or fundamentally injust, have been repeated again and again.

In *Hawkins v. Bleakly*, 243 U. S. 210, involving the Iowa statute, this Court pointed out "that the act *prescribes the measure of compensation* and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; * * *. This disposes of the contention that the administrative body is clothed with an *arbi-*

BLEED THROUGH– POOR COPY

trary and unbridled discretion, inconsistent with a proper conception of due process of law." In *Mountain Timber Co. v. Washington,* 243 U. S. 219, involving the act of Washington, this Court pointed out that the act expressly declared that its purpose was to provide "sure and *certain* relief for workmen," and that the states were not prevented by the 14th Amendment from requiring employers to pay compensation "according to a *reasonable and definite scale,*" but that, as held in the *White Case,* "* * * we repeat * * * that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises."

In *Arizona Copper Co. v. Hammer,* 250 U. S. 400, this Court pointed out that the Arizona Employers' Liability Law, there under scrutiny for constitutional defects, (p. 420) "imposes upon the employer * * * a liability in compensatory damages, excluding all such as are *speculative* or punitive." The employers there argued that their common law right to employ workmen was unconstitutionally infringed by the statute, and in referring to the inevitability of injury and death in hazardous occupations, occurring without fault on the part of either employer or employee, this Court further said (pp. 423-429):

> "* * * In view of the subject matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the states from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.
>
> "The rule being based upon *reasonable grounds* affecting the public interest, *being established in advance and applicable to all alike under similar circum-*

stances, there is, in our opinion, no infringement of the *fundamental rights* protected by the Fourteenth Amendment.

"* * * we held in that case *(N. Y. C. R. Co. v. White)* the novel statutory scheme of awarding compensation according to a *prearranged scale* is sustainable * * *. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds *not arbitrary or fundamentally unjust*, the question whether the award shall be measured as compensatory damages are measured at common law, *or according to some prescribed scale reasonably adapted to produce a fair result*, is for the state itself to determine."

Under the "other cases" provision as interpreted and applied in these cases, the workingman is required to take chances in a lottery much less favorable to him than was allowed at common law. If he could recover at all under the common law he would generally obtain damages that were compensatory. Under the Maryland compensation statute as interpreted and applied he is limited in the maximum amount recoverable and can never tell how much he will recover. The amount of recovery is controlled by the whim of the commissioner who happens to hear the case. It is apparent, therefore, that the rights of a workingman under the statute, as interpreted and applied in these cases, depends "not upon the law but upon the unguided and unrestrained discretion of men."

In *New York Central R. Co. v. Bianc*, 250 U. S. 596, where employers challenged the section of the New York law compensating disfigurements as invalid because not requiring awards thereunder to be based upon impairment of earning power, this Court held that loss of earning power need not be the sole justification for compensation and that facial or other disfigurement actually had a direct relation

BLEED THROUGH– POOR COPY

to earning power, but, while sustaining the constitutionality of the statute as there applied, nevertheless emphasized the limitation clearly expressed in its previous decisions upholding compensation acts, namely, that consistent with due process a state may adopt other methods of compensation "provided the result be not inconsistent with fundamental rights." The Court reiterated its language in the *Arizona Employers' Liability Cases, supra,* 250 U. S. 429, that the grounds upon which a state may establish a right to compensation may not constitutionally be "arbitrary or fundamentally unjust," and that so far as is concerned the question of compensation, due process requires the award to be measured *"according to some prescribed scale reasonably adapted to produce a fair result."*

In *Madera Sugar Pine Co. v. Industrial Accident Commission,* 262 U. S. 499, the employer contended that the compensation act of California, as construed to require compensation for the death of employees to be paid to their non-resident alien dependents, was unconstitutional because the sole justification for the validity of the act's requirements for the payment of compensation for death was to prevent dependents from becoming public charges of the state. This Court rejected that contention, and in discussing the general provisions of the California act making it indistinguishable from other state statutes which had been held valid pointed out that "such compensation being recoverable by the employees, *according to a prescribed scale* guaged by their previous wages and the *extent* of their disability."

In *Cudahy Packing Co. v. Parramore,* 263 U. S. 418, the employer contended that the Utah workmen's compensation act construed to make compensable the death of an employee killed by a train while the employee was on his

way to work was unconstitutional as imposing liability arbitrarily and capriciously. In denying that contention this Court said, through Mr. Justice Sutherland (pp. 422-424):

> "The question saved in the state court and presented here is whether the statute, as thus construed and applied, is valid under the provisions of the Fourteenth Amendment.
>
> "It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be *so clearly unreasonable and arbitrary as to subject it to the ban of the constitution.* * * *
>
> "Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, * * * is a matter of sufficient public concern * * * to escape condemnation as arbitrary, capricious, or clearly unreasonable."

It is not deemed necessary in this brief to do more than refer to a few of the decisions in which this Court has laid down and applied the basic proposition that it is unconstitutional for a statute to delegate to an administrative body the power of decision or regulation unless the discretion thereby conferred be canalized by standards or guides wherewith to govern the exercise of the discretion. Cited in the Statement as to Jurisdiction are *Schechter Poultry Corp. v. United States*, 295 U. S. 495, and *Panama Refining Co. v. Ryan*, 293 U. S. 388, both of which involved the unconstitutionality of not providing adequate standards to govern the making of regulations, which principle, however, has been applied indiscriminately both to the making of administrative regulations and to the decisions of facts.

It is pointed out about those two decisions that this Court invalidated administrative action under standards actually

BLEED THROUGH– POOR COPY

set up, because they were too vague, emphasizing the point that statutes and practices which provide no standards or guides, as the "other cases" provision as construed, are that much worse and more clearly unconstitutional.

In the *Schechter Case* this Court held invalid a Presidential promulgation of a "code of unfair competition" for the poultry industry, under the National Recovery Act. The vice was said to be that the act supplied "no standards for any trade, industry, or activity * * *. The discretion of the President * * * is virtually unfettered * * *. Authority thus conferred is an unconstitutional delegation of legislative power."

In the *Panama Refining Case*, Mr. Chief Justice Hughes, speaking for the Court, used the following language as descriptive of the provision there struck down (at p. 430 of 293 U. S.): "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

It is respectfully submitted that in determining the substantiality of the federal questions involved in these appeals, as well as the matter of the constitutional invalidity of the "other cases" provision as construed by the court below, the rule to be applied ought to be the one of liberality of construction particularly applicable to judicial scrutiny of workmen's compensation statutes. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408, 414; *Industrial Commission of Wisconsin v. McCartin*, 67 S. Ct. 886, 889.

In conclusion it is submitted that in every aspect from which the federal questions involved in these cases may be judged they are substantial and ought to be decided by this Honorable Court, and that the motions to dismiss the appeals herein ought to be denied.

Respectfully submitted,

PAUL BERMAN,
SIGMUND LEVIN,
THEODORE B. BERMAN,
Counsel for Appellants.

Baltimore, Maryland
August 13, 1947.